BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.
Opinion of the Court Below

The opinion of the Supreme Court of the State of Oklahoma has not as yet been published in the official Oklahoma Reporter; however, it is reported in 118 Pacific Reporter, Second Series, page 244, and is copied in full in the record of this case on pages 39 to 43. The decision was rendered on May 6, 1941, and thereafter a petition for rehearing was filed by the plaintiff in error which was overruled and denied on October 28, 1941.

II.
Jurisdiction.

Jurisdiction of this Court is covered by the Judicial Code, Section 237b, as amended by the Act of February 13, 1925, and as provided by Rule 38 of the revised rules of this Court adopted February 13, 1939, as amended, and that the date of the judgment to be reviewed is May 6, 1941.

III.
Statement of Case.

A statement of the case has been made in the petition and, in the interest of brevity, will not be repeated here.

IV.
Specifications of Error.

1. That said Supreme Court of the State of Oklahoma

erred in affirming the decision of the District Court of Osage County, Oklahoma.

2. That the Supreme Court of the State of Oklahoma erred in holding that all restrictions on the alienation of lands inherited by Osage Indians who hold certificates of competency were removed by the provisions of Section 6 of the Act of Congress approved April 18, 1912 (37 Stat. L. 86).

3. That the Supreme Court of the State of Oklahoma erred in holding that Section 7 of the Act of Congress approved April 18, 1912, does not apply to the restricted lands of deceased allottees and which are not assets in the hands of his administrators for the payment of debts.

4. That the Supreme Court of the State of Oklahoma erred in holding that Section 3 of the Act of Congress approved February 27, 1925 (43 Stat. L. 1008), imposing restrictions on inherited lands of said Osage Indians, does not purport to restrict the alienation of such lands belonging to Osage Indians who hold certificates of competency.

V.
ARGUMENT—SUMMARY
Act of April 18, 1912

It is a national policy to preserve and protect the allotted or inherited tribal property of Indians—including Osage Indians who have not yet been emancipated from the federal guardianship. *United States v. Ramsey*, 271 U. S. 467, 70 L. ed. 1039.

Pursuant to this policy—and in an attempt to carry it

out insofar as members of the Osage Tribe are concerned, the Congress has enacted an elaborate scheme for the protection of the property of such Indians. It has reserved the minerals underlying the allotted surface of the lands to the tribe until April 8, 1983 (Act June 24, 1938, 52 Stat. L. 1034, c. 645, Sec. 3); it has made contracts for debt invalid as to certain members of the tribe (Act February 27, 1925, 43 Stat. L. 1008, c. 359, sec. 5 as amended Act. March 2, 1929, c. 493, sec. 5); it has restricted the use of their individual funds (Act June 24, 1938, supra, sec. 1); and has even prohibited white people from inheriting any portion of their restricted property (Act Feb. 27, 1925, supra, sec. 7).

In order to carry out this national policy the Congress has gone further and attempted to protect an Osage heir against his own improvidence incurred by the expectation of wealth as a result of a large inheritance. To do this, the Congress provided in Section 7 of the Act of April 18, 1912 (37 Stat. L. 86, c. 83):

> "That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs: *Provided, however,* That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid under order of the county court of Osage County, State of Oklahoma:"

Notwithstanding this unambiguous statute the Supreme

Court of Oklahoma read into its provisions an exception in Section 6 of the same act, as follows:

> "When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed."

The Supreme Court of Oklahoma bottomed its decision in regard to this holding on two fallacious arguments. The first was that the point had already been decided in *United States v. Mullendore*, 30 F. Supp. 13. That this conclusion is erroneous is clearly shown by the following statement in the opinion of the Mullendore Case:

> "Reading the Act of April 18, 1912 as a whole, there is apparent in it a purpose to protect Osage allottees and their Osage Indian heirs through the imposition of restrictions upon the alienation of their allotted lands and trust moneys, but there seems to be no policy for the protection of non-members of the tribe, the implication being to the contrary. Compare Levindale Lead & Zinc Co. v. Coleman, 241 U. S. 432, 36 S. Ct. 644, 60 L. Ed. 1080; Sec. 5, Act of March 2, 1929, 45 Stat. L. 1478, 1481, 25 U. S. C. A. § 331 note."

The second fallacious argument of the Supreme Court of Oklahoma is:

> "Assuming, however, that the provision in section 7 was a restriction or limitation of the right to encumber or alienate, the lands in the instant case were not subject to control of the administrator. They were not assets in his hands for the payment of the debts of the deceased. The deceased was a full blood Osage Indian who had not received a certificate of competency. Therefore her lands were restricted, and free from any of her obligations. Under the various Acts of Congress these lands could

not be taken to satisfy the debts of the deceased owner. Act of June 28, 1906, secs. 4, 7 (34 Stat. 539); Act of April 18, 1912, sec. 7 (37 Stat. 86); Act of March 3, 1921, sec. 3, (41 Stat. 1249); Act of February 27, 1925, sec. 3 (43 Stat. 1008); Act of March 2, 1929 (45 Stat. 1480. We have so held with reference to the headrights of deceased Osages. Tucker v. Brown, 185 Okla. 234, 90 Pac. (2d) 1071; Brunt v. Labadie, 186 Okla. 700, 100 Pac. (2d) 267. The jurisdiction of the county court extended to the determination of heirship (In re Thompson's Estate, 179 Okla. 240, 65 Pac. (2d) 442), but not beyond that.

"It follows that there was no court or officer with power or authority to 'turn over' the lands or to deliver them to the heirs. Immediately on the death of the owner they descended to the heirs free from all restrictions together with the absolute right of immediate possession."

In this reasoning the Court lost sight of or refused to follow exactly contrary decisions of the Circuit Court of Appeals of the United States and its own decisions, based on the applicable act of Congress. Section 3 of the 1912 Act, supra, provides, in part, as follows:

"That the property of deceased *** allottees of the Osage Tribe *** shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma ***".

In the case of *Globe Indemnity Company v. Bruce,* (10th C. C. A.), 81 Fed. (2d) 143, it was held that under the act of Congress the jurisdiction of the County Courts of Oklahoma extended to all of the "property" of a deceased Osage Indian, including the income from his headright, and that a

final order of the county court concerning such property could not be collaterally attacked, even assuming the order was wrong.

The Supreme Court of Oklahoma in the case of *In re Thompson's Estate*, 179 Okl. 240, 65 P. (2d) 442, in its first syllabus (which is the law of the case by statute in Oklahoma) said:

> "The act of April 18, 1912 (37 Stat. 86), which provides 'that the property of deceased *** allottees of the Osage Tribe *** shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma ***' (section 3), operated to subject the same to the full probate jurisdidction of the county courts of Oklahoma."

Thus the reasoning of the court as to the application of section 7 of the Act of 1912 is clearly contrary to previous decisions, state and federal, construing this section.

Nor is there any occasion for this confusion. Accepting the view of the Supreme Court that the provisions of section 6 are applicable, they should be read and construed with section 7 and when so interpreted the two sections would provide this in substance:

> "When the heirs of such deceased allottees have certificates of competency *** the restrictions on alienation are hereby removed" (sec. 6)

but

> "No lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to

the time such lands and moneys are turned over to such heirs." (sec. 7)

Under such a construction each part of the act is employed and violence is done to neither. As said by the Supreme Court of Oklahoma in *Wah-hrah-lum-pah v. To-wah-e-he*, 77 Okl. 295, 188 Pac. 106:

> "The Act of Congress is not only for the benefit of the allottee, but also for the benefit of his heirs."

Unless these two sectons are thus construed, section 7 is meaningless and the safeguards enacted by Congress are thwarted.

Act of February 27, 1925

This statute is plain, unambiguous, and very simple. Section 3 (43 Stat. L. 1008, c. 359) provides:

> "Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior."

The United States District Court for the Northern District of Oklahoma has construed this section in *United States v. Johnson*, 29 Fed. Supp. 300, as follows:

> "Defendant contends that it was the intention of Congress, in enacting Section 3 of the Act of February 27, 1925, to classify, as to the alienation of lands received by will or by inheritance, on the same basis as the lands which were received by allotment, and that lands devised to or inherited by members of one-half (½) or more

Indian blood, who do not have Certificates of Competency, were restricted as to alienation, but that lands devised to or inherited by members of less than one-half (½) Indian blood, were free from restrictions and could be alienated. An attempt is made to construe the Act so as to limit its effect to members of the Osage Tribe of one-half (½) or more Indian blood who do not have Certificates of Competency. The Act plainly states that it applies to two classes: first, to lands devised to members of the Osage Tribe of one-half (½) or more Indian blood; and, second, to lands devised to members of the Osage Tribe who do not have Certificates of Competency. It is insisted by defendant that the disjunctive 'or' should be construed to mean the conjunctive 'and', in order to ascertain the clear intent of Congress, and the case of United States v. Fisk, 3 Wall. 445, 70 O. S. 445, 18 L. Ed. 243, is cited. The congressional Act is so plainly written as to render impossible the construction sought by the defendant. The language is clear and shows that it applies to two classes of Indians, and it cannot be construed to mean that it applies to Indians of one-half (½) or more Indian blood who do not have Certificates of Competency.

"A decree may enter for the plaintiff, to the effect that the conveyance to the defendant was invalid because of restrictions imposed against the land involved."

George Pitts, the petitioner herein, comes squarely within the statute. He is a full-blood members of the tribe and thus squarely within the first class contemplated by the statute. Under its plain terms, therefore, lands inherited by him are "inalienable unless such lands be conveyed with the approval of the Secretary of the Interior." That a mortgage is an alienation within the meaning of the statute is no longer open to question. No approval of the mortgage in

this case was given by the Secretary of the Interior.

The reasoning of the Supreme Court of Oklahoma as to this section is uncomprehensible. After quoting the statute and the language of the court in *United States v. Johnson*, supra, the Supreme Court contends itself by saying:

> "In any event, it is clear that all Indians holding certificates of competency were excluded from the restrictions in section 3. Plaintiff belonged to that class, and his inherited lands were left free of restrictions.
>
> "In the Johnson case the court was considering the question of restrictions on the inherited tribal lands of an unenrolled member of the tribe of less than half Indian blood. The court held that the Act of 1929, supra, reimposed restrictions on such Indians, and since the heir in that case had no certificate of competency his inherited land was restricted by section 3 of the Act of 1925. The case is hardly in point, but it serves as some authority that Osages who have certificates of competency are not affected by section 3, supra."

Just how the court could arrive at this conclusion after quoting the Johnson Case is not understandable, nor is it explained by the court. In any event, it seems clearly wrong in view of the plain terms of the statute and under the decision of *United States v. Johnson.*

CONCLUSION.

A decision on the merits of this case by this court is of vital importance, because:

1. Two acts of Congress relating to the administration

of Indian affairs have been held inoperative insofar as all Osages similarly situated are concerned.

2. Title to many thousands of acres of land are affected. In examining title to similar lands, a lawyer must choose between two conflicting decisions. If he follows *United States v. Johnson* the land is restricted; but if he follows *Pitts v. Drummond* the land is unrestricted. Thus intolerable conflict regarding land title will prevail. Because an act of Federal Congress is now the subject of a conflict of decisions which cannot be harmonized or reconciled. this court should review the act and the conflicting decisions and end the controversy by its authoritative decision.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that your petitioner may have justice, and that a writ of certiorari should be granted, and this Court should review the decision of the Supreme Court of the State of Oklahoma and finally reverse the same.

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